Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1099

PEOPLE ex rel. WILLIAM J. SCOTT, Attorney General and MICHAEL J. HOWLETT, Secretary of State of the State of Illinois,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, an Illinois Corporation; ILLINOIS CENTRAL INDUSTRIES, INC., a Delaware Corporation; ILLINOIS CENTER CORPORATION, a Texas Corporation; and ILLINOIS CENTER PLAZA VENTURE, a partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, the Attorney General and the Secretary of State of the State of Illinois, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 7, 1975.

OPINION BELOW

The opinion of the Court of Appeals is reported at 525 F. 2d 178 and is included herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 7, 1975. A timely petition for rehearing and suggestion of rehearing en banc was denied on December 8, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Tax Injunction Act, 28 U.S.C. § 1341, operates as a jurisdictional bar in an action which does not seek an injunction.

2. Whether the Court of Appeals erred in sua sponte invoking 28 U.S.C. § 1341 without affording the parties opportunity to plead, brief and argue the issue.

3. Whether the Court of Appeals erred in characterizing the pending action as one contemplated under § 1341.

STATUTE INVOLVED

United States Code, Title 28:

§ 1341. Taxes by States

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

STATEMENT OF THE CASE

This action was originally brought by the Illinois Central Railroad Co., a special Illinois corporation, for a declaratory judgment that its existence had been dissolved pursuant to a plan of reorganization approved by the Interstate Commerce Commission, and that the Illinois Central Gulf Railroad Company, a Delaware Corporation, became the owner of its assets, and that Illinois statutes prohibiting dissolution and transfer of assets are in conflict with the Interstate Commerce Act. [Appendix B1]

An answer and counterclaim was filed by the Illinois Attorney General on behalf of the Secretary of State and the People of the State of Illinois. [Appendix B6]

Motions of counterdefendants to dismiss the counterclaim were granted, from which order an appeal was taken.

The Court of Appeals for the Seventh Circuit did not rule upon the merits of the issues raised on appeal, but instead, vacated the order of the district court and, sua sponte, ordered dismissal of the complaint on jurisdictional grounds, invoking the Tax Injunction Act, 28 U.S.C. § 1341. [Appendix A]

Petition for rehearing, and suggestion of rehearing en banc, was denied.

The Illinois Central Railroad Company was created by special legislative act on February 10, 1851. [R.S. 1874, p. 909]. Federal lands granted to the State by an Act of Congress, effective September 20, 1850, were transferred by the Illinois General Assembly to the railroad corporation, together with other valuable assets and privileges, pursuant to the covenants and conditions of the charter grant, as a "solemn and binding contract."

The railroad charter became part of the laws of the State of Illinois. (e.g. Ill. Rev. Stat. 1973, Chap. 32, § 157.160; Chap. 114, § 166; Chap. 120, § 373, 374; Illinois Central Railroad Separate Section, 1870 Constitution of Illinois)

The Illinois statutes expressly provide:

> ". . . nothing herein contained shall be so construed as to authorize or permit the Illinois Central Railroad Company to sell the railroad constructed under its Charter, approved February 10, 1851, or to mortgage the same, except subject to the rights of the State under its contract with said company, contained in its said Charter, or to dissolve its corporate existence, or to relieve itself or its corporate property from its obligations to this State, under the provisions of said Charter . . ."

The Illinois Central Railroad Company subsequently reorganized its corporate structure to form a parent holding company, Illinois Central Industries, a Delaware Corporation, and in 1962 relegated the operations of the railroad to a wholly owned subsidiary position.

Illinois Central Industries also organized Illinois Center Corporation, a Texas Corporation, a wholly owned subsidiary, and Illinois Center Plaza Venture, a partnership with Metropolitan Structures, to develop and exploit the unique and invaluable railroad charter property on the Chicago lakefront for commercial and residential uses. Individual parcels of this railroad charter property are being transferred to the non-railroad subsidiaries of the corporate parent, and thus, the proceeds and profits removed from further use to maintain and operate the railroad.

On or about August 14, 1972, Illinois Central Railroad Company purportedly transferred all of its remaining assets to Illinois Central Gulf Railroad Company, a Delaware Corporation, and unilaterally dissolved its existence as a special Illinois Corporation. The State of Illinois refused to recognize the dissolution and transfer of assets to the Delaware Corporation.

Thereafter, Illinois Central Railroad Company filed suit against the Illinois Secretary of State, seeking a declaration under the Supremacy Clause of the Constitution that the dissolution and transfer of assets had been valid and effective notwithstanding contrary Illinois laws. The Illinois Attorney General appeared as attorney for the Secretary of State and filed an answer, and a counterclaim on behalf of the People of the State of Illinois, challenging the transfers of railroad charter properties and business opportunities to its corporate alter egos to escape charter obligations and seking as relief to impress a trust and to require an accounting. Illinois Central Industries, Illinois Center Corporation and Illinois Center Plaza Venture were joined as additional parties to the counterclaim.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRONEOUSLY INVOKED THE FEDERAL TAX INJUNCTION ACT IN THE INSTANT CASE SINCE THE GRAVAMEN OF THE COMPLAINT IS RAILROAD REORGANIZATION AND FEDERAL SUPREMACY NOT TAXATION.

Section 1341 of Title 28 expressly provides that a federal district court "shall not enjoin the collection, levy or assessment of any tax."

The Court of Appeals has erred in characterizing the case at bar as one to enjoin the Illinois corporate franchise tax. The sole legal issue is IC's purposed dissolution and reorganization in conflict with existing state law prohibiting such dissolution. The only dispute with respect to the franchise tax is whether it is to be paid by Illinois Central Railroad Co. or by its corporate alter ego, Illinois Central Gulf Railroad Co. The Tax Injunction Act bears no significance to the litigation.

The Complaint filed by IC alleges the interstate commerce and federal question jurisdiction of the federal court [28 U.S.C. § 1337; 1331(a)], arising under the Supremacy Clause of the United States Constitution [Article VI, second paragraph] and the Interstate Commerce Act [49 U.S.C. § 5].

In its Complaint, Illinois Central seeks a declaration that: (a) "plaintiff has been dissolved pursuant to the Plan of Reorganization approved by the Interstate Commerce Commission"; (b) "all of its assets have been transferred to the Illinois Central Gulf Railroad Company";

and (c) existing State statutes barring dissolution and transfer of assets [i.e., R.S. 1874, p. 919; Ill. Rev. Stats. 1973, Chap. 32, § 157.160(a); Chap. 114, § 166] "[have] been nullified by action of the Interstate Commerce Commission acting under the authority of Section 5 of the Interstate Commerce Act." (Complaint, para. 1, 3, 4, 5, 7, 8; prayer para. 1, 3, 4, 5)

Clearly, the Complaint presents federal constitutional questions, not state tax questions. [Cf. *Lyford* v. *City of New York*, 137 F. 2d 732, 787 (CA 2, 1943)] It should be noted that the Complaint does not challenge the validity of the state franchise tax [see, e.g., *Stratton* v. *St. Louis Southwestern Ry. Co.*, 284 U.S. 530 (1932)], or its application to stated capital and paid-in surplus, under whichever corporate umbrella the railroad is operating. (Complaint, para. 7) Nor does the Complaint question the actual amount of tax to be paid, or seek to suspend the collection of state taxes.

In actuality, the only question to be decided is whether IC has effectively dissolved its special Illinois Charter under the sanction of the Interstate Commerce Commission, and has thus abrogated the Illinois statutes prohibiting unilateral dissolution and transfer of assets. Since the lawsuit initiated by IC in no way involves restrictions on the money-gathering power of the state so as to impair the fiscal integrity of the state [e.g., *Hargrave* v. *McKinney*, 413 F. 2d 320, 326 (CA 5, 1069), fn. 13], the court improperly applied § 1341 in dismissing this action.

Perhaps the most strikingly similar case to the instant action is *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, 509-510, 52 S. Ct. 260 (1931). Suit was expressly brought for an injunction against collection of the oleomargarine tax.

The applicable statute (R.S. § 3224, 28 U.S.C. § 154) provided:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Despite a literally irrefutable dissent, the Supreme Court refused to bar the suit, and analyzed the underlying public purpose of the statute to be directed against taxpayers who would "delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government."

The court concluded:

> "This is not a case in which the injunction is sought upon the mere grounds of illegality because of error in amount of the tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying § 3224 apply, if at all, with little force. (Citations)"

In *D.C. Transit System* v. *Pearson*, 149 F. Supp. 18, 20 (D.D.C. 1957), the court similarly noted:

> "Numerous exceptions to the comprehensive ban against injunctions to restrain the collection of taxes have been developed by judicial decisions. *As a result these statutes may be said to be more honored in the breach than in the observance.*
>
> • • •
>
> Accordingly, the Court is of the opinion that this action may be maintained and will proceed to a determination of the merits, namely, first, whether Capital Transit Company was liable for the tax in question; and, second, if so, whether this liability has been assumed by the plaintiff." (Emphasis added)

[Cf. *Tomlinson* v. *Smith*, 128 F. 2d 808, 811 (CA 7, 1942); *Builders and Developers Corp.* v. *Manassas Iron & Steel*

Co., 208 F. Supp. 485, 491-492 (Md. 1962), *Central Steel & Wire Co.* v. *Detroit*, 99 F. Supp. 639, 640-641 (E.D. Mich. S.D. 1951)]

Significantly, the State, which is the intended beneficiary of the Tax Injunction Act, had no need to assert its protection in the instant case, since there is no possibility of the ultimate loss of revenue to the State, and thus no threat to its fiscal integrity.

In view of the fact that the Illinois corporate franchise tax is not in dispute, it was clear error of the Circuit Court to sua sponte invoke § 1341 to dismiss the lawsuit, and certiorari should be allowed to review the judgment below.

II.

THE COURT OF APPEALS ERRED IN SUA SPONTE INVOKING A NOVEL JURDICTIONAL BAR WITHOUT PERMITTING THE PARTIES AN OPPORTUNITY TO PLEAD, BRIEF AND EXPLICATE THE ISSUE.

The opinion of the Court of Appeals concedes that the possible application of § 1341 to the instant case had never been pleaded, briefed or argued by any of the parties at any stage of the proceedings, until the Circuit Court sua sponte raised the issue during oral argument. Nevertheless, the court summarily ordered that the lawsuit be dismissed on the basis of that statute. This decision not only denied the parties a ruling on the merits of the issues presented for review in the appeal, but also arbitrarily precluded a hearing on the merits of the Tax Injunction Act issue invoked by the court.

Whenever novel questions of jurisdiction have been raised after a case has been briefed and argued on other issues, the courts, as a matter of sound judicial procedure and due process, must afford the parties an opportunity to adequately respond and fully inform the court.

For example, in *Stratton* v. *St. Louis Southwestern Ry. Co.*, 284 U.S. 530, 531-532 (1932), re-argument was expressly ordered by the court on the limited question of jurisdiction. See, also, e.g., *Matthews* v. *Rodgers*, 284 U.S. 521, 523, 52 S. Ct. 217 (1932).

In *California Diversified Promotions, Inc.* v. *Musick*, 505 F. 2d 278, 280-281 (CA 9, 1974), the District Court had dismissed sua sponte on jurisdictional grounds. The Circuit Court reversed, saying:

> *"Here the trial judge should have given notice of his intention to dismiss, an opportunity to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court,* Potter v. McCall, 433 F. 2d 1087, 1088 (9th Cir. 1970), Bertucelli v. Carreras, 467 F. 2d 214 (9th Cir. 1972)."

The Rule is no less appropriate in a reviewing court, especially when the relevant jurisdictional facts and arguments were never made part of an appeal, as in the case at bar, and jurisdiction was never questioned by any party or by the District Court.

Since it was Illinois Central Railroad Company which had initially brought this action, and since the State had raised no objection, there is at least a strong presumption that jurisdiction existed until a record is made to show otherwise. As the Supreme Court stated in *Bell* v. *Hood*, 327 U.S. 678 (1946):

> . . . Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United

States. . . . [W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. . . . The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy. . . . Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. . . . The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

• • •

Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction. *Gully* v. *First National Bank*, 299 U.S. 109, 112, 113, 81 L. Ed. 70-72, 57 S. Ct. 96; *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199, 200, 65 L. Ed. 577, 585, 41 S. Ct. 243."

See also *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963).

The possible application of § 1341 in the case at bar is dependent upon the real issues of the complaint and the actual prayer for relief, and the Tax Injunction Act should not have been summarily interposed to terminate the litigation prior to a clear explication by the parties of their position.

In *Land* v. *Dollar*, 330 U.S. 731, 735 (1947), the Court recognized that there were certain types of cases "where the question of jurisdiction is dependent on decision of the merits." In declining to render an opinion of the merits of the controversy involved in that case, the Court stated: "We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." *Id.* at 739.

The Tenth Circuit in *Schramm* v. *Oakes*, 352 F. 2d 143, 149 (1965) noted:

"Certainly the trial court may gather evidence on the question of jurisdiction by affidavits or otherwise in an effort to determine the facts as they exist . . . and based upon the evidence so obtained, decide the jurisdictional dispute before trial. One deviation from this procedure is in the case where the issue of jurisdiction is dependent upon a decision on the merits. Land v. Dollar, 330 U.S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209. In that circumstance, the trial court should determine jurisdiction by proceeding to a decision on the merits."

The Fifth Circuit applied this principle in *McBeath* v. *Inter-American Citizens for Decency Comm.*, 374 F. 2d 359, 362-63 (1967), *cert. denied*, 389 U.S. 896 (1967):

"Undoubtedly, under Rule 12(d) of the Federal Rules of Civil Procedure a court may determine the prerequisites to jurisdiction in advance of a trial on the merits. However, where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other.

• • •

The question of jurisdiction here . . . is so inextricably connected with the merits of the case itself that it was error for the court to determine that it lacked juris-

diction, thereby dismissing the suit, without according McBeath a full opportunity to prove his case on the merits. ***

McBeath should have been allowed to develop this evidence in a full hearing on the merits where the issue of jurisdiction and the merits are so closely tied together and inseparable. It was error for the court summarily to preclude him from so doing."

In the instant case, the Court of Appeals erroneously disregarded all due process provision for notice, hearing or fact finding on the jurisdictional question.

III.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF JURISDICTION WHICH HAS NOT BEEN CLEARLY RESOLVED BY THE SUPREME COURT.

The circuit court cites *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943) and *Stratton* v. *St. Louis Southwestern Ry. Co.*, 284 U.S. 530 (1932) to support its summary dismissal of the lawsuit. *Stratton* can be immediately distinguished on two grounds. Plaintiffs therein had actually sought an injunction to restrain the collection of an alleged unconstitutional state franchise tax, and the equity jurisdiction of the district court was expressly challenged by a motion to dismiss the complaint. Moreover, *Stratton* was decided before the enactment of the Tax Injunction Act of 1937 and is hopelessly out of date.

Great Lakes is also of questionable persuasion since the language of the Tax Injunction Act has subsequently been amended. The public policy reasons for the initial adoption of the Tax Injunction Act are discussed in detail in *Hargrave* v. *McKinney*, 413 F. 2d 320, 325-26 (CA 5, 1969) and fn. 9.

In *Great Lakes*, 319 U.S. 293, 299 (1943), the Court reviewed the history of the Act:

> "Congress recognized and gave sanction to [the] practice of federal equity courts by the Act of August 21, 1937, 50 Stat. 738, enacted as an amendment to Section 24 of the Judicial Code, 28 U.S.C. § 41(1), 28 U.S.C.A. § 41(1). This provides that *no district court shall have jurisdiction of any suit to* enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.' " (Emphasis added)

As the Supreme Court later observed in *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623, 66 S. Ct. 445 (1945), it was against this background that the *Great Lakes* case was decided.

The Tax Injunction Act was revised in 1948 to read as it does in its present form. Notably, the language of § 1341 now speaks in terms of non-availability of certain described equitable remedies, and not as a per se denial of jurisdiction of the court:

> "The district curt shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State Law where a plain, speedy and efficient remedy may be had in the courts of such State."

See *City of Houston* v. *Standard-Triumph Motor Co.*, 347 F. 2d 194, 196 (CA 5, 1965) f.n. 6.

The prevailing rule of statutory construction is succinctly stated in *Volkswagen of America, Inc.* v. *United States*, 340 F. Supp. 983, 989 (Cust. Ct. 1972), aff'd 494 F. 2d 703 (1974):

> "*Here there has been an entire rephrasing and restructuring of the statutory provision, a circumstance*

which always warrants a fresh determination of meaning free of the influence of old decisions, interpretations and administrative practices. Strouse, Adler & Co. v. United States, 3 Ct. Cust. Appls. 184, 186, T.D. 32466 (1912); United States v. New York Cordage Co., 18 CCPA 23, 25, 26, T.D. 43977 (1930); Rice Millers' Association, American Manufacturers v. United States and Oberle (Inc.), 15 Ct. Cust. Appls. 355, 358, T.D. 42560 (1928); Cellas (Inc.) v. United States, 18 CCPA 237, 241, T.D. 44405 (1930). *In any event, the use of a significant new term is more than enough reason to justify a full examination of the new language in its own right.*" (Emphasis added)

The circuit court however, has not attempted to make such a fresh determination of the critical jurisdiction question, and has not proceeded so as to insure a full examination of the meaning and effect of the new language of § 1341 with reference to the real issues in the instant action.

Instead, by acting sua sponte and relying upon outdated cases, the court has with finality denied the parties any opportunity to address the jurisdiction issue.

In *Great Lakes*, the Court affirmed "solely . . . in the exercise of the [District] Court's discretion . . ." but expressly declined to decide the question whether § 1341 acts as a jurisdictional bar to the issuance of declaratory relief by a fedral court.

Subsequent to *Great Lakes*, other courts have reexamined the jurisdictional issue in the modern context. In *Hargrave* v. *McKinney*, 413 F. 2d 320, 326 (CA 5, 1969) a dismissal for lack of jurisdiction under the new § 1341 was reversed, the court saying:

> "Thus, we must resolve the narrow question of whether the policies which underline Section 1341 operate as to make that section a *jurisdictional* bar to the maintenance of this action. Emphasis on the word jurisdictional is useful to highlight it as a word of art. Jurisdiction is a matter of naked power which can be regulated only by Congress consistent with Article III of the Constitution. *Encroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the Constitution must be construed narrowly. Cf.* Phillips v. United States, 1941, 312 U.S. 246, 251, 61 S. Ct. 480, 85 L. Ed. 800. Moreover, the Supreme Court has pointed out that restrictions upon the federal court's equity jurisdiction (before the Federal Rules) even in cases involving the fiscal affairs of a state were construed so as to preserve federal jurisdiction where the asserted federal right (could not) be preserved without it. Matthews v. Rodgers, 1932, 284 U.S. 521, 525, 52 S. Ct. 217, 219, 76 L. Ed. 447. In view of the legislative history of this section and the myriad of cases holding generally that Section 1341 should be applied so as to protect the integrity of the state treasury, we hold that this section does not, as a *jurisdictional* matter, bar plaintiffs from the federal courts." (Emphasis added)

As the circuit court in the instant action, the appellees in *Hargrave* had also relied upon the *Great Lakes* and *City of Houston* cases:

> "Appellees rely heavily on case law to sustain their view of Section 1341 as a jurisdictional bar.
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> • • •
>
> Reliance is placed upon City of Houston v. Standard Triumph Motor Company, 5 Cir. 1965, 347 F. 2d 194. We read the bar in that case to be not applicable here. First, the dissenting opinion points out that the majority's decision is predicated on *Great Lakes, supra, which was an abstention decision, not a jurisdictional determination. See* 347 F. 2d at 103. Second, the *fiscal integrity of the state was at issue in both City of Hous-*

ton and Great Lakes: A successful declaratory judgment would inhibit the revenue-gathering powers of the state to the same extent as injuctive relief. The instant suit, however, does not involve restrictions of the money-gathering power.

• • •

Finally, we do not read City of Houston as a jurisdictional barrier in actions not falling within the literal terms of the Act since Congress is the only competent entity to amend a jurisdictional statute. See Great Lakes, 319 U.S. at 300, 63 S. Ct. 1070. *Cf.* Study of the Division of Jurisdiction Between State and Federal Courts. American Law Institute, (Tent, Draft No. 6) § 1371(a)." (Emphasis added) Page 326, f.n. 13.

The compelling dissent in *City of Houston* v. *Standard-Triumph Motor Co.*, 347 F. 2d 194, 201-205 (CA 5, 1965) is particularly enlightening:

"Let me discuss further whether the Johnson Act does establish a jurisdictional bar to the entertainment of a declaratory judgment action with respect to the assessment, levy or collection of any tax under state law. That it does not is, I submit, manifest from the plain language of the one-sentence statute. The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. 28 U.S.C. § 1341. *No amount of legalistic language can convert that plain statute into a denial of federal jurisdiction to entertain a declaratory judgment action with respect to a tax under state law. The Supreme Court itself has repeatedly recognized that the Great Lakes case went no further than to establish a rule of discretion.*

Professor Moore, after quoting at length from the Great Lakes case, stated with his usual clarity the effect of that decision:

'Thus the Court did not give a definitive answer as to whether or not the 1937 [Johnson] Act includes declaratory judgments. In view of the fact that the Declaratory Judgment Act had been on the books for three years prior to the 1937 Act, Congress was undoubtedly aware of the remedies afforded by that procedure. That the 1937 Act made no mention of declaratory judgments is evidence that the declaratory remedy was not included within the Act's prohibition. Thus federal courts still have technical jurisdiction to render declaratory judgments as to the invalidity of state taxes.'

• • •

6 Moore, Federal Practice ¶ 57.18 (2d ed. 1952), pp. 3096-97.

• • •

The declaratory judgment statute itself makes clear that the court has jurisdiction with respect to state taxes. That statute begins: In a case of actual controversy within its jurisdiction, *except with respect to federal taxes,* any court of the United States etc. (Emphasis supplied.) There could hardly be a plainer case calling for the application of the rule *ex pressio unius est exclusio alterius.* While the statute expressly excludes controversies over federal taxes, controversies over state taxes are not similarly excluded. See 3 Barron & Holtzoff, Federal Practice & Procedure, Rules ed. (Wright) § 1264, p. 290, with the pertinent authorities collected in footnote 45. *That the Johnson Act does not establish a judicial bar to a district court's entertainment of a declaratory judgment action with respect to a tax under state law is made clear by simply reversing the positions of the parties.* If the present defendants, the City of Houston and the Houston Independent School District, had as plaintiffs filed this complaint naming the present plaintiff as defendant,

there could be no argument but that the court had jurisdiction . . .'' (Emphasis added)

The circuit court has erred in perceiving § 1341 as a mandatory jurisdictional bar. Since this question remains unsettled by the Supreme Court with respect to actions not falling within the literal terms of the Tax Injunction Act, a writ of certiorari should be granted.

CONCLUSION

An important question of federal jurisdiction has been raised by the decision of the Court of Appeals for the Seventh Circuit. The Supreme Court has never definitively decided the applicability of the Tax Injunction Act as a mandatory jurisdictional bar to lawsuits not within the literal terms of 28 U.S.C. § 1341.

The circuit court has erred in invoking § 1341 in the case at bar, and in sua sponte dismissing the lawsuit without affording the parties opportunity to plead, brief and explicate the issue.

Wherefore petitioners respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals for the Seventh Circuit entered November 7, 1975, and that the order of the Circuit Court be vacated and cause remanded for further proceedings.

Respectfully submitted,

WILLIAM J. SCOTT,
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Attorney for Petitioners,

HERBERT LEE CAPLAN,
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Of Counsel.

APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1013

ILLINOIS CENTRAL RAILROAD COMPANY

Plaintiff-Appellee,

v.

MICHAEL J. HOWLETT, Secretary of State of the State of Illinois,

Defendant-Appellant.

PEOPLE EX REL. WILLIAM J. SCOTT, Attorney General, and MICHAEL J. HOWLETT, Secretary of State of the State of Illinois,

Counter-Plaintiffs-Appellants,

v.

ILLINOIS CENTRAL RAILROAD COMPANY, an Illinois corporation; ILLINOIS CENTRAL INDUSTRIES, INC., a Delaware corporation; ILLINOIS CENTER CORPORATION, a Texas corporation; and ILLINOIS CENTER PLAZA VENTURE, a partnership,

Counter-Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—
No. 74 C 300
RICHARD B. AUSTIN, *Judge*

ARGUED OCTOBER 29, 1975—DECIDED NOVEMBER 7, 1975

Before HASTINGS, *Senior Circuit Judge*, SPRECHER and BAUER, *Circuit Judges*.

SPRECHER, *Circuit Judge*. This appeal involves the *sua sponte* application by this court of the anti-tax-injunction statute, 28 U.S.C. § 1341, to preclude federal jurisdiction of a complaint seeking a declaration of the collectability of the Illinois corporate franchise tax.

I

Illinois Central Railroad Company (IC) brought this action praying that the court declare "[t]hat plaintiff does not owe any franchise tax to the State of Illinois for 1973 or any subsequent years." The complaint alleged that the Interstate Commerce Commission had approved a Plan of Reorganization of IC under Section 5 of the Interstate Commerce Act, whereby IC "shall proceed to dissolve and such dissolution shall be effective upon the tendering of a certificate of Dissolution for filing in the office of the Secretary of State of Illinois." The complaint further alleged that the IC has tendered a certificate of dissolution but the Illinois Secretary of State "has refused to acknowledge that [IC] has been dissolved as a corporation" and seeks payment of a franchise tax of $158,943.78. IC alleged that "[s]aid claim for franchise tax asserted by [the Secretary of State] against [IC] has no legal basis. . . ."

The Secretary of State filed an answer denying that IC was legally dissolved as an Illinois corporation or that it is no longer in existence. At the same time the Secretary of State, together with the "People of the State of Illinois ex rel. . . . Attorney General of the State of Illinois" filed a counterclaim, naming three counter-defendants in addition to IC, seeking to impress a trust in favor of the People of the State of Illinois on properties transferred by IC to one or more of the counter-defendants.

Upon the motions of the counter-defendants, the district court dismissed the counterclaim without prejudice on the grounds that the Secretary of State lacked the authority to raise the issues of the counterclaim and that the Attorney General was not a defendant to the complaint in a position to counterclaim. The court concluded that "[i]f the Illinois Attorney General wishes to litigate the Counterclaim issues, he must proceed by an independent action in an appropriate forum."

II

28 U.S.C. § 1341 provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

In *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299 (1943), the Supreme Court said in regard to this provision:

> It is true that the Act of Congress speaks only of suits "to enjoin, suspend, or restrain the assessment, levy, or collection of any tax" imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases,

require a like restraint in the use of the declaratory judgment procedure.'"[1]

Although neither the Secretary of State, nor the Attorney General on his behalf, raised 28 U.S.C. § 1341 in the district court or here, that statute cannot be waived by the parties[2] and its application may be made *sua sponte* by the court of appeals. In *Great Lakes*, the Supreme Court said that "it is the court's duty to withhold [declaratory] relief" when, in the words of Section 1341, there is "a plain, speedy and efficient remedy . . . in the courts of" the state.[3] 319 U.S. at 300-301; *City of Houston* v.

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1. In *Samuels* v. *Mackell*, 401 U.S. 66, 71 (1971), the Court said: "The continuing validity of the Court's holding in the *Great Lakes* case has been repeatedly recognized and reaffirmed by this Court."

2. One of the additional counter-defendants raised the issue of federal jurisdiction over the complaint in both the district court and on appeal, and on oral argument here, counsel for IC and the other two counter-defendants expressly stated that those parties had no objection to dismissal of the entire cause of action as lacking federal jurisdiction because of 28 U.S.C. § 1341.

3. In *Perez* v. *Ledesma*, 401 U.S. 82, 128 (1971), Mr. Justice Brennan (concurring in part and dissenting in part) said in n.17:

> The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer in-

Standard-Triumph Motor Co., 347 F.2d 194, 198 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966).

The Illinois corporate franchise tax sought to be avoided by the complaint was assessed pursuant to the Illinois Business Corporation Act, Ill. Rev. Stats., ch. 32, § 157.131 *et seq.* Substantially the same tax as previously provided in Sections 105 *et seq.* of the Illinois Corporation Act was at issue in *Stratton* v. *St. Louis Southwestern Ry Co.*, 284 U.S. 530 (1932), where the Supreme Court concluded that the State of Illinois provided legal remedies sufficient to preclude federal jurisdiction to adjudicate the validity of the franchise tax.[4]

> solvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts. See generally S. Rep. No. 1035, 75th Cong., 1st Sess. (1937). These considerations make clear that the underlying policy of *the anti-tax-injunction statute*, 28 U.S.C. § 1341, relied on in *Great Lakes, bars all anticipatory federal adjudication* in this field, not merely federal injunctions (emphasis added).

4. The Supreme Court said at 532-34:

> Recovery of the tax may not be had, even though illegally exacted, unless its payment is procured by duress. See *Richardson Lubricating Co.* v. *Kinney*, 337 Ill. 122; 168 N.E. 886. But where the payment is of a corporate franchise tax like the present, made to avoid forfeiture of the franchise, which would result from nonpayment, there is such duress as entitles the taxpayer to recover. *O'Gara Coal Co.* v. *Emmerson*, 326 Ill. 18, 21; 156 N.E. 814; *Western Cartridge Co.* v. *Emmerson*, 335 Ill. 150; 166 N.E. 501; see *Chicago and Eastern Ry. Co.* v. *Miller*, 309 Ill. 257; 140 N.E. 823.
>
> * * *
>
> [Ill. Rev. Stats., ch. 127, § 172 does not] impair the existing legal remedy, but supplements it by providing a method under the local procedure for staying payment over the tax money, so that it may be available for the satisfaction of any judgment obtained against the collector. See *Interstate Iron and Steel Co.* v. *Stratton*, 340 Ill. 422; 172 N.E. 705;

The State of Illinois parties have argued that federal jurisdiction attached because of the approval of the Plan of Reorganization by the Interstate Commerce Commission under Section 5 of the Act. This argument was disposed of by the Supreme Court in *Seaboard Air Line Railroad Co.* v. *Daniel*, 333 U.S. 118, 122-23 (1948):

> So far as the appellant's complaint is concerned, this is not the kind of action to "set aside" a Commission order of which the federal district courts have exclusive jurisdiction. While the action does involve the scope and validity of a Commission order, the relief requested in the complaint was the removal of an obstruction to the railroad's obedience to the order, not its suspension or annulment. Nor did the answer seek to have the enforcement of the order enjoined, although it did question its validity as a basis for the relief sought in the complaint.
>
> The appellant was in this dilemma. Federal law required it to obey the order so long as it remained in effect; for a failure to abide by its terms serious federal penalties could be imposed on it. 49 U.S.C. §§ 10(1), 16(7), (8), (9), (10). On the other hand, South Carolina statutes provide penalties for obedience to the order, which South Carolina officials asserted were enforceable against appellant despite the Commission's order. There was thus a bona fide controversy between appellant and the state officials over the validity of the order. Appellant wanted to obey the order; the state officials insisted appellant must obey their statutes instead. *Federal district courts have not been granted special jurisdiction to review and confirm orders of the Commission at the suit of railroads wishing to obey such orders.*
>
> Under the foregoing circumstances appellant was not compelled to wait until someone who had standing to attack the Commission's order might decide to seek its annulment in a federal district court. It properly sought relief from a court which could obtain jurisdiction of the parties whose refusal to recognize the order gave rise to its predicament. *And the state court then had power, because of the issues raised by the complaint and because of the relief requested, to determine whether the order, properly interpreted, did exempt appellant from compliance with the state railroad corporation laws and, if so, whether the Commission had transcended its statutory authority in making the order. Illinois Cent. R. Co.* v. *Public Utilities Comm'n*, 245 U.S. 493, 502-505. See *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.*, 258 U.S. 377, 381-382; *Central New England R. Co.* v. *Boston & A. R. Co.*, 279 U.S. 415, 420-421 (emphasis added).

The Illinois parties' argument that *Seaboard* merely holds that federal courts do not have *exclusive* jurisdiction when Section 5 is involved, is undoubtably true, but under 28 U.S.C. § 1341 the existence of such a plain, speedy and efficient remedy in the state court is enough to bring Section 1341 into operation. Inasmuch as the state courts had the power to act despite the presence of the Section 5 aspects of the case, there are no "special circumstances" (*Stratton, supra* at 534) nor is this an "exceptional case" (*Great Lakes, supra* at 299) preventing the normal application of 28 U.S.C. § 1341. All of the allegations and

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O'Gara Coal Co. v. *Emmerson, supra; Hump Hairpin Mfg. Co.* v. *Emmerson*, 293 Ill. 387; 127 N.E. 746; 258 U.S. 290. These cases recognize the continued existence in Illinois of the right to recover the tax . . .

There being a legal remedy for the recovery of the tax, no case is made for invoking the jurisdiction of equity to enjoin collection of it in the absence of allegations setting up special circumstances which would render the legal remedy inadequate.

In addition, Illinois has a Declaratory Judgment Act of its own, Ill. Rev. Stat., ch. 110, § 57.1. *See City of Houston* v. *Standard-Triumph Motor Co.*, 347 F.2d 194, 199 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966).

prayers of the complaint were intertwined with the ultimate collection or non-collection of the Illinois franchise tax.

Inasmuch as the counterclaim was incidental to a claim for declaratory relief which in itself should not be entertained by the district court under the restraint of 28 U.S.C. 1341, we vacate the dismissal of the counterclaim and remand the cause with directions to dismiss the complaint and the cause of action itself, which will have the effect of also disposing of the counterclaim.

VACATED AND REMANDED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS CENTRAL RAILROAD COMPANY, a Dissolved Corporation,

Plaintiff,

vs.

MICHAEL J. HOWLETT, Secretary of State of the State of Illinois,

Defendant.

No. 74 C 300

COMPLAINT

Plaintiff, ILLINOIS CENTRAL RAILROAD COMPANY, a dissolved corporation, by Barnet Hodes, J. Herzl Segal, William G. Clark and Irwin I. Zatz, its attorneys, complaining of the Defendant, MICHAEL J. HOWLETT, SECRETARY OF STATE OF THE STATE OF ILLINOIS, alleges as follows:

1. Plaintiff was incorporated by special act of the legislature of the State of Illinois on February 10, 1851. Plaintiff continued in existence as a corporation until August 14, 1972 when it was dissolved as a corporation under the circumstances hereinafter more particularly described. Under Section 94 of the Illinois Business Corporation Act, plaintiff, as a dissolved corporation, has the capacity to sue for the purpose of winding up its affairs.

2. The defendant is the duly elected and acting Secretary of State of the State of Illinois. As such officer, he possesses certain powers and duties respecting corporations doing business in the State of Illinois, which powers and duties include the collection of corporate franchise taxes. Said defendant has an office in the City of Chicago, Illinois from which he conducts official business involving his powers and duties respecting corporations.

3. Jurisdiction of this cause is based upon 28 U.S.C. Section 1331(a) and 28 U.S.C. Section 2201. The action arises under Section 5 of the Interstate Commerce Act, as amended, 49 U.S.C. Section 5, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

4. During the year 1968, a certain Plan of Reorganization was entered into among plaintiff and the following named corporations: Illinois Central Industries, Inc., a Delaware corporation, duly authorized to do business in the State of Illinois; Gulf Mobile and Ohio Railroad Company, a Mississippi corporation, duly authorized to do business in the State of Illinois; and Illinois Central Gulf Railroad Company, a Delaware corporation, which subsequently became authorized to do business in the State of Illinois. Said Plan of Reorganization was submitted to the Interstate Commerce Commission for approval. On December 20, 1971, the Interstate Commerce Commission approved said Plan of Reorganization. A true and complete copy of said Plan of Reorganization is attached hereto as Appendix A including attachments thereto respectively described as Annex A, Annex B, and Exhibits A through C, both inclusive. Paragraph 8.3 of said Plan of Reorganization provided:

> "8.3 Dissolution of Central. After the aforesaid distribution of the Industries common has been made or provided for, Central [Illinois Central Railroad Company] shall proceed to dissolve and such dissolution shall be effective upon the tendering of a certificate of Dissolution for filing in the office of the Secretary of State of the State of Illinois."

5. On August 10, 1972, plaintiff transferred all of its assets to Illinois Central Gulf Railroad Company, pursuant to said Plan of Reorganization, and thereafter on August 14, 1972, pursuant to and in compliance with the above quoted paragraph 8.3 of the Plan of Reorganization, plaintiff tendered a Certificate of Dissolution to the Secretary of State of the State of Illinois for filing in his office.

6. Notwithstanding the above quoted provision in the Plan of Reorganization relating to the dissolution of plaintiff, the defendant has refused to acknowledge that plaintiff has been dissolved as a corporation. On or about May 10, 1973, the defendant sent to plaintiff a written notice that plaintiff owes the State of Illinois, payable to the Secretary of State, a franchise tax of $158,943.78 based upon all of its stated capital and paid-in surplus of $158,943,778.00, which notice further stated that said franchise tax was due and payable July 1, 1973 (for the twelve month period ending June 30, 1974) and that a penalty of 1% per month would accrue for failure to pay said franchise tax. A true and complete copy of said notice is attached hereto as Appendix B. On May 18, 1973, plaintiff duly filed with the defendant its objection to the assessment of said franchise tax.

7. Said claim for franchise tax asserted by the defendant against plaintiff has no legal basis because plaintiff was dissolved and ceased to have any corporate existence on August 14, 1972 when it tendered to the defendant the

Certificate of Dissolution prescribed by said paragraph 8.3 of the Plan of Reorganization. On August 10, 1972 plaintiff had transferred all of its assets to Illinois Central Gulf Railroad Company and from and after that date, plaintiff had no stated capital and paid-in surplus upon which any franchise tax could be based or levied. Illinois Central Gulf Railroad Company became the owner of all of the assets of plaintiff and became liable for and has from time to time paid franchise taxes to the defendant based upon the assets formerly owned by the plaintiff and upon which said claim of $158,943.78 purports to be based.

8. Section 5 of the Interstate Commerce Act (49 U.S.C. Section 5) provides that the authority conferred upon the Interstate Commerce Commission in dealing with railroad consolidations shall be exclusive and plenary. The approval of the Plan of Reorganization by the Interstate Commerce Commission on December 20, 1971 had the legal force and effect of overriding any statute of the State of Illinois, if there be such a statute, which might be interpreted as prohibiting the dissolution of plaintiff. Plaintiff is informed and believes and therefore alleges that the defendant relies upon certain statutes of the State of Illinois to justify his position that the plaintiff, under Illinois law, is prohibited from dissolving. For the reasons stated above, plaintiff asserts that the position of the defendant is contrary to law and in direct conflict with the mandate of the Supremacy Clause in Section 5 of the Interstate Commerce Act.

WHEREFORE, plaintiff prays:

1. That this Court adjudge and declare that plaintiff has been dissolved pursuant to the Plan of Reorganization approved by the Interstate Commerce Commission.

2. That plaintiff does not owe any franchise tax to the State of Illinois for 1973 or any subsequent years.

3. That there is no statute of the State of Illinois which prohibits the dissolution of plaintiff or in the alternative that if there is any such statute, its force and effect has been nullified by action of the Interstate Commerce Commission acting under the authority of Section 5 of the Interstate Commerce Act.

4. That the Court make such other declaration of the rights of the parties as may be necessary to determine the controversy which exists between the parties.

5. That the Court grant plaintiff such other and further relief as may be just and proper.

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ANSWER

NOW COMES MICHAEL J. HOWLETT, Secretary of State of the State of Illinois, by WILLIAM J. SCOTT, Attorney General of the State of Illinois, his Attorney, and answers the Complaint of Plaintiff as follows:

1. Admits the Plaintiff was created as a legal entity on February 10, 1851, by special legislative act of the Illinois General Assembly, in consideration of mutual undertakings contained therein, and as amended by subsequent special legislative acts, which "Charter" became part of the laws of the State of Illinois, copy of which is attached hereto as Exhibit A and incorporated by reference; Further answering, alleges that the special conditions of the "Charter" were republished and incorporated by reference in the Illinois Central Railroad Separate Section of the Illinois Constitution of 1870; Denies that the Plaintiff was legally dissolved as an Illinois Corporation and is no longer in existence, but affirmatively state that Plaintiff is prohibited by its "Charter", and Illinois Revised Statutes, Chapter 120, § 373, 374, Chapter 32, § 157.160(a) and Chapter 114, § 166, from unilaterally dissolving or acting to alter, defeat or avoid its "Charter" obligations.

2. Admits paragraph 2.

3. Answering paragraph 3, denies that Section 5 of the Interstate Commerce Act, as amended, is controlling or determinative of the contractual obligations of the Plaintiff to the State of Illinois under the "Charter" of 1851, and denies that the Interstate Commerce Commission can impose an ex post facto law or impair the obligation of contracts as guaranteed by Article 1, Sections 9 and 10 of the U.S. Constitution.

4. Has no personal knowledge of truth or falsity of allegations in paragraph 4 and neither admits or denies but demands strict proof thereof; and further answering, alleges that the State of Illinois was not a party to the said reorganization agreement, and did not receive compensation for the release or alteration of contractual rights under the "Charter" of 1851, and did not ratify, approve or consent to the terms of the said plan of reorganization insofar as they unilaterally operated to alter, defeat or avoid Plaintiff's contractual obligations under the "Charter" of 1851; and neither Plaintiff nor Defendant nor the Interstate Commerce Commission has the power or right unilaterally and ex parte to abrogate, renounce or alter the "Charter" of 1851; and further, that the said plan of reorganization does not acknowledge, or purport to determine, the contractual obligations of the parties herein.

5. Has no personal knowledge of truth or falsity of allegations of transfer of assets; admits tender of purported Certificate of Dissolution; and further answering, alleges that Plaintiff did not have the right or power to breach its "Charter" obligations, and to unilaterally act to transfer "Charter" assets to a foreign corporation or to dissolve.

6. Answering paragraph 6, denies that Plaintiff has been dissolved as a corporation, or that Plaintiff has such a unilateral power or right under the "Charter" of 1851; and further answering, alleges that the rights and obligations of the parties with respect to "Charter" operations and "Charter" assets are prescribed by the contractual undertakings in the "Charter" of 1851.

7. Answering paragraph 7, denies that Plaintiff was dissolved and ceased to have any corporate existence on August 14, 1972; denies that Plaintiff has the unilateral power or right to transfer "Charter" assets to a foreign corporation or that any other entity became the legal and beneficial owner of said "Charter" assets in the manner described.

8. Answering paragraph 8, denies that Section 5 of the Interstate Commerce Act, as amended, is controlling or determinative of the contractual obligation of the Plaintiff to the State of Illinois under the "Charter" of 1851, and denies that the Interstate Commerce Commission can impose an ex post facto law or impair the obligation of contracts as guaranteed by Article 1, Sections 9 and 10 of the U.S. Constitution; and further answering, alleges that the State of Illinois was not a party to the said reorganization agreement, and did not receive compensation for the release or alteration of contractual rights under

the "Charter" of 1851, and did not ratify, approve or consent to the terms of the said plan of reorganization insofar as they unilaterally operated to alter, defeat or avoid Plaintiff's contractual obligations under the "Charter" of 1851; and neither Plaintiff nor Defendant nor the Interstate Commerce Commission has the power or right unilaterally and ex parte to abrogate, renounce or alter the "Charter" of 1851; and further, that the said plan of reorganization does not acknowledge, or purport to determine, the contractual obligations of the parties herein.

WHEREFORE Defendant prays that an Order be entered finding and declaring: (a) that the contractual rights and obligations of the parties are as set forth in the "Charter" of 1851, and as subsequently amended; (b) that the Plaintiff is barred from transferring "Charter" assets and dissolving without the ratification and consent of the Illinois General Assembly; (c) that Plaintiff has acted to unilaterally abrogate and breach its contractual obligations with the State of Illinois by transfer of "Charter" assets and dissolution; (d) that the purported plan of reorganization is ineffective to defeat or avoid Plaintiff's contractual obligations to the State of Illinois under the "Charter" of 1851, and null and void as to a unilateral dissolution of Plaintiff; and (e) that Judgment be entered in favor of Defendant and against Plaintiff together with costs so wrongfully sustained, and Plaintiff take nothing by its action and Defendant go hence without day.

COUNTERCLAIM

PEOPLE ex rel. WILLIAM J. SCOTT, ATTORNEY GENERAL, and MICHAEL J. HOWLETT, SECRETARY OF STATE OF THE STATE OF ILLINOIS,

Counter-Plaintiffs,

vs.

ILLINOIS CENTRAL RAILROAD CO., an Illinois corporation; ILLINOIS CENTRAL INDUSTRIES, INC., a Delaware corporation; ILLINOIS CENTER CORPORATION, a Texas corporation; and ILLINOIS CENTER PLAZA VENTURE, a partnership,

Counter-Defendants.

No. 74 C 300

NOW COME PEOPLE OF THE STATE OF ILLINOIS ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, and MICHAEL J. HOWLETT, Secretary of State of the State of Illinois, Counterplaintiffs, and complaining of the Illinois Central Railroad Co., an Illinois corporation, Illinois Central Industries, Inc., a Delaware corporation, Illinois Center Corporation, a Texas corporation, and Illinois Center Plaza Venture, a partnership, Counterdefendants, say as follows:

COUNT I

1. That Counterdefendant Illinois Central Railroad Co. was created by special legislative act of the Illinois General Assembly on February 10, 1851, and as amended by subsequent legislative acts, copy of which is attached hereto as Exhibit A and incorporated by reference, hereinafter referred to as the CHARTER.

2. That pursuant to the provisions of the CHARTER, the State of Illinois ceded and granted to Illinois Central Railroad Co. certain valuable lands, waters, materials and privileges belonging to the State, hereinafter referred to as CHARTER property, for the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining and operating a railroad with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan Canal, to a point at the City of Cairo, with a branch of the same to the City of Chicago on Lake Michigan; and also a branch via the City of Galena, to a point on the Mississippi River, opposite the town of Dubuque in the State of Iowa, hereinafter referred to as the CHARTER lines.

3. That the CHARTER is a public act of the State of Illinois to be favorably construed for all of the purposes therein expressed, and forms a contract between the State and the Illinois Central Railroad Co. for the faithful performance of all of the covenants and conditions of the CHARTER.

4. That included in the CHARTER properties are certain lands and air rights thereto located in the City of Chicago, County of Cook, State of Illinois, presently bounded by the Chicago River on the North, Lake Michigan on

the East, Randolph Street on the South and Michigan Avenue on the West, as illustrated in Exhibit B attached hereto.

5. That the Illinois Central Railroad Company also claims as CHARTER properties, and asserts unrestricted title to, certain lands on Chicago's lakefront reclaimed from the floor of Lake Michigan, and the air rights thereto, within the area described in paragraph 4 above, as illustrated in Exhibit C attached hereto, extending between the Chicago River on the North and 51st Street on the South.

6. That the land and air rights described in paragraphs 4 and 5 above are unique, irreplaceable and of incalculable monetary value, estimated to exceed one billion dollars, and will continue to appreciate in value in the future.

7. That on information and belief, on or about August 31, 1962, 97.91% of the voting shares of the Illinois Central Railroad Company were transferred to the sole control of Illinois Central Industries, Inc., a Delaware corporation, organized for the purpose, inter alia, of exploiting for commercial and residential development the CHARTER properties ceded by the State of Illinois to the Illinois Central Railroad Company, and the disputed reclaimed land and air rights, described in paragraphs 4 and 5 above.

8. That on information and belief, on or about January 4, 1961, Illinois Center Corporation, a Texas corporation, was organized, and is a wholly owned subsidiary of Illinois Central Industries, Inc. for the purpose of exploiting for commercial and residential development the CHARTER properties described in paragraphs 4 and 5 above, including the disputed reclaimed lands and air rights.

9. That on information and belief, Illinois Central Railroad Company, Illinois Central Industries, Inc. and Illinois Center Corporation organized Illinois Center Plaza Venture, a partnership agreement with Metropolitan Structures, for the purpose of exploiting for commercial and residential development the CHARTER properties described in paragraphs 4 and 5 above, including the disputed reclaimed lands and air rights.

10. That on information and belief, Illinois Central Railroad Company has entered into one or more agreements with and through its corporate alter egos and partners, Illinois Central Industries, Inc., Illinois Center Corporation and Illinois Center Plaza Venture, to transfer valuable CHARTER properties, and disputed reclaimed lands and air rights, for insufficient consideration, and to divert and reallocate proceeds and profits accruing from their exploitation from maintaining and operating the CHARTER lines for which purpose the CHARTER grants were made to enriching and increasing the income and net worth of non-charter foreign corporations, which have no financial obligation or enforcible legal responsibility to maintain and operate the CHARTER lines.

11. That maintaining and operating the CHARTER lines requires continuous substantial reinvestment of capital, for which purpose the CHARTER properties were originally granted.

WHEREFORE Counterplaintiffs pray that Order and Decree be entered finding and declaring:

A. that CHARTER properties of Counterdefendant Illinois Central Railroad Company, and/or the full, fair proceeds and profits from their exploitation, must be segregated and expended to maintain and operate the CHARTER lines;

B. that all transactions between Counterdefendants involving CHARTER properties, and impairing the CHARTER interests of Illinois Central Railroad Company and the People of the State of Illinois, are ineffective to transfer CHARTER properties and/or the full, fair proceeds and profits from their exploitation, from Illinois Central Railroad Company, an Illinois corporation, and that all such CHARTER properties be impressed with a trust, and Counterdefendants be held to be constructive trustees for the benefit of the People of the State of Illinois pursuant to the Act of 1851 and;

C. that Counterdefendants render an accounting of all transactions with respect to CHARTER properties, and the proceeds and profits resulting therefrom, and to accrue in the future and;

D. that all Counterdefendants be directed to pay into a common fund for the maintenance and operation of CHARTER lines, the amounts found due and owing by an accounting, and to pay over such amounts which shall accrue in the future;

E. or in the alternative, that the unilateral dissolution and breach of the "Charter" by Illinois Central Railroad Company is a forfeiture, and all CHARTER properties revert to the People of the State of Illinois.

COUNT II

1-11. Repeat and reallege each and every allegation contained in paragraphs 1 through 11 of Count I as paragraphs 1 through 11 of Count II.

12. That on information and belief, Illinois Central Railroad Company has entered into one or more agreements with and through its corporate alter egos and partners, Illinois Central Industries, Inc., Illinois Center Cor-

poration and Illinois Center Plaza Venture, to appropriate and take from the People of the State of Illinois, without consideration, public lands of the State on Chicago's lake front, reclaimed from the floor of Lake Michigan, and the air rights thereto, as described in paragraphs 4 and 5 above, and to divert and reallocate the proceeds and profits accruing from their exploitation from maintaining and operating the CHARTER lines, for which purpose the CHARTER grants were made, to enriching and increasing the income and net worth of non-charter foreign corporations which have no financial obligation or enforcible legal responsibility to maintain and operate the CHARTER lines.

WHEREFORE Counterplaintiffs pray that a judgment order and decree be entered finding and declaring:

A. that a special master be appointed to conduct a survey to establish the metes and bounds of all lands along Chicago's lake front which Illinois Central Railroad Company had reclaimed from the floor of Lake Michigan between the Chicago River on the North and 51st Street on the South, and;

B. that title to all reclaimed lake bottom lands be declared to be in the People of the State of Illinois,

C. or in the alternative, that all such reclaimed lake bottom lands be impressed with a trust and Counterdefendants be held to be constructive trustees for the benefit of the People of the State of Illinois pursuant to the Act of 1861, and

D. that Counterdefendants be permanently enjoined from entering into sale or air rights lease agreements

with other parties, or transferring title claims with respect to all such reclaimed lake bottom lands without consent of the Illinois General Assembly.

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